ESTATE OF LITTLE SNAKE (JOHN SMITH)

IBIA 93-13 Decided July 27, 1993

Appeal from an order denying reopening issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 41241-38.

Affirmed.

1. Indian Probate: Reopening: Standing to Petition for Reopening

   An adult who participated in the original probate hearing into a deceased Indian's estate lacks standing to petition for reopening.

2. Indian Probate: Reopening: Standing to Petition for Reopening

   Where a petition to reopen a closed Indian estate is based on a claimed interest which derives entirely from the petitioner's predecessor in interest, the petitioner has only the standing that his/her predecessor would have had.

3. Indian Probate: Reopening: Generally

   Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

APPEARANCES: J. Lawrence Blankenship, Esq., Regan Wade Cole, Esq., and Gladys E. Cherry, Esq., Oklahoma City, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Irene V. Cole Guy seeks review of an August 26, 1992, order denying reopening issued by Administrative Law Judge Sam E. Taylor in the estate of Little Snake (John Smith) (decedent). For the reasons discussed below, the Board affirms Judge Taylor's order.

Background

Decedent, Cheyenne Allottee 432, and appellant's mother, Alice Cole (Cole), were married on June 24, 1935, in Kansas. After the marriage, they lived on decedent's property in Oklahoma and were still married at the time

of decedent's death on March 6, 1937. Cole was, at least in part, African-American. 1/ Decedent executed a will on May 4, 1936, in which he devised his wife "$1.00 love and affection."

During the probate of decedent's estate, Cole claimed that she was entitled to inherit decedent's estate as his wife. She also presented an alternative claim against the estate in case her right to inherit was rejected. This was a claim in the amount of $2,100 for services rendered during the time she lived with decedent as his wife.

The initial probate hearing in decedent's estate was held on May 16, 1938, following which the Examiner of Inheritance recommended that Cole not be recognized as decedent's wife because her marriage to decedent violated the laws of Oklahoma. He further recommended that Cole's claim for services be disapproved (Examiner's Summary of Report on Heirs, June 29, 1938). On February 15, 1939, the Assistant Commissioner of Indian Affairs, with the concurrence of the Assistant Secretary of the Interior, directed the Examiner of Inheritance to hold a further hearing for the purpose of determining whether Cole was married to decedent by Indian custom. A second hearing was held on August 16, 1939. Cole attended both hearings and was represented by an attorney at the second hearing.

On January 18, 1940, the Assistant Secretary issued an Order Approving Will and Determining Heirs. The order did not recognize Cole as an heir of decedent but did allow her claim for services in the reduced amount of $1,050. 2/ Notice of the order was given to the parties by letter of February 24, 1940, from the Acting Commissioner of Indian Affairs. The letter was sent to both Cole and her attorney. It concluded:

> Any interested party who was served with notice of the hearing or who was present at the hearing, and who may be dissatisfied with the said decision, may file a petition for rehearing with the Examiner of Inheritance or the Commissioner of Indian Affairs, within sixty (60) days from the date hereof. Under the Rules, petitions filed after that date cannot be considered. No payment is to be made until sixty (60) days after this date, unless all parties agree.

Cole did not file a petition for rehearing. Her son, Herman Cole, whose claim for $500 had been rejected, and who was represented by the

---

1/ Cole testified that she had Choctaw and/or Cherokee ancestors, as well as white ancestors. Cole's testimony at May 16, 1938, hearing at 1; Cole's testimony at Aug. 16, 1939, hearing at 10.
2/ Although the order itself did not give the reason for rejection of Cole's heirship claim, a Nov. 27, 1939, letter to the Secretary from the Acting Commissioner of Indian Affairs recommended that the claim be rejected because the marriage between decedent and Cole was void under Oklahoma law.

same attorney as Cole, did file a petition for rehearing. His petition was denied by the Assistant Secretary on May 8, 1940.

In October 1991, appellant and her sons, Calvin Guy and James Guy, filed petitions to reopen decedent's estate. Judge Taylor denied all three petitions. Only appellant appealed to the Board.

It appeared to the Board, after review of appellant's notice of appeal, the probate record, and the governing probate regulations, that appellant faced a substantial obstacle in proving herself entitled to seek reopening of this estate. Accordingly, the Board ordered appellant to show cause why Judge Taylor's order should not be summarily affirmed. 3/ The order stated in part:

> A preliminary review of the record shows that * * * Alice Cole, through whom appellant claims an interest in this estate, received notice of and attended the probate hearing.
>
> The probate regulations in effect at the time of the original probate appeared at 25 CFR Part 81 (1938). They provided, in relevant part:
>
> > 81.34 **Rehearings**. Any aggrieved person claiming an interest in the trust or restricted property of an Indian, who has received notice of the hearing to determine heirs or consideration of a will [sic], or who was present at the hearing, may file a motion for rehearing within 60 days from the date of notice on him of the determination of heirs or action on a will, or within such shorter period of time as the Secretary of the Interior may determine to be appropriate in any particular case. * * *
> >
> > 81.35 **Reopenings**. No case in which the decision of the Secretary of the Interior approving or disapproving an Indian will, or determining the heirs of a deceased Indian, has become final, will be reopened

---

3/ It was also apparent that most of the parties with an interest in this matter, i.e., the successors in interest to decedent's heirs as determined in 1940, had not been notified of any of the proceedings before Judge Taylor or of appellant's appeal to the Board. Upon informal inquiry to the Anadarko Area Office, Bureau of Indian Affairs (BIA), the Board learned that no request had been made to BIA to attempt identification of these parties. Although the Board could not determine how difficult it would be to identify the proper parties, it appeared appropriate, in the interests of judicial economy, to require appellant to show that she had some right to maintain this appeal prior to initiating the search for parties.

> at the petition of any person who received notice of the hearing on the determination of heirs or consideration of the will, or who was present at such hearing, and received notice of such final decision, except as provided in § 81.34.
>
> The present regulations similarly provide that a person who had notice of the original probate proceeding is not entitled to seek reopening. * * *
>
> Even those persons who are entitled to seek reopening must produce compelling proof that they have acted with due diligence in pursuing their claims. E.g., Estate of George Dragswolf, Jr., 17 IBIA 10 (1988), and cases cited therein.

(Order to Show Cause at 1-2).

Discussion and Conclusions

Appellant's response to the Board's order discusses the merits of her challenge to the 1940 order. Appellant challenges that order on the basis of the unconstitutionality of the Oklahoma statute under which Cole was determined not to be the wife of decedent. She bases her argument upon, inter alia, Loving v. Virginia, 388 U.S. 1 (1967), and Dick v. Reaves, 434 P.2d 295 (Okla. 1967). 4/ Appellant also contends that she has pursued her claim with due diligence following the decisions in Loving and Dick.

[1] Appellant does not, however, address the threshold problem posed by the fact that Cole attended both probate hearings in this matter. As is evident from the 1938 regulations quoted above, a person who attended a probate hearing was not entitled to seek reopening of an estate. Similarly, under the present regulations governing reopening of estates, a petition may be filed only by a person who "had no actual notice of the original proceedings." 43 CFR 4.242(a), (h). A person who attended a probate hearing is clearly one who had actual notice of the proceedings. Under the current regulations, as under the 1938 regulations, such an individual lacks standing to petition for reopening. E.g., Estate of Richard Lip, 15 IBIA 97 (1987), and cases cited therein.

[2] Appellant has no personal interest in decedent's estate. Instead, her claimed interest derives in its entirety from her mother. Accordingly, appellant's standing here is also derivative. Her standing is the same as her mother's would have been had she pursued the claim. Cf. Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (1987). Accordingly, under both the 1938 regulations and the current regulations, appellant lacks standing to petition for reopening of this estate.

4/ In Loving, the United States Supreme Court declared the Virginia miscegenation statute unconstitutional. In Dick, the Oklahoma Supreme Court invoked Loving to strike down the Oklahoma miscegenation statute.

There are, however, special circumstances present in this case. The Oklahoma miscegenation statute which caused Cole to be denied heirship rights in decedent's estate has been declared unconstitutional. Thus it is at least arguable that the Board should set aside the regulatory impediment discussed above, under its authority to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate," 43 CFR 4.318, in order to give appellant an opportunity to advance an argument based on Loving and Dick.

[3] Appellant faces an obstacle here as well. Loving and Dick were decided in 1967. The Board has a well-established rule concerning the reopening of estates closed for more than three years: One who seeks reopening must show by compelling proof that he or she has acted with due diligence. In Dragswolf, supra, the Board stated:

> In interpreting the due diligence requirement, the Board takes into consideration the specific circumstances of the case before it. In cases where the petitioner had knowledge necessary to question the initial decision for many years prior to actually filing the petition, reopening has been denied. Estate of Katie Crossguns, 10 IBIA 141 (1982); Estate of Josephine Bright Fowler, 8 IBIA 201 (1980); Estate of Samuel Picknoll (Pickernell), 1 IBIA 168, 78 I.D. 325 (1971).
>
> The rules developed during years of Indian probate decisionmaking in the Department have resulted in an appropriate and fair balance between the need for finality in probate decisions and the need to correct errors in the decisions. Numerous decisions denying reopening, in some cases even though the probable validity of a claim was recognized, have been grounded on a recognition that "[t]he public interest requires that proceedings relative to the probate of estates be brought to a final conclusion sometime, in order that the property rights of the heirs or devisees may be stabilized." Estate of Lone Dog, IA-25 (June 12, 1950) at 3. Accord, e.g., Estate of George Minkey, [1 IBIA 1 (1970)]; Estates of Jose Sandoval, et al., IA-1337 (May 17, 1966); Estate of Mrs. Jack Bowstring, IA-1250, 68 I.D. 262 (Sept. 11, 1961); Estate of Abel Gravelle, IA-75 (Apr. 11, 1952). Because of the substantial interest of Indian heirs and devisees in the finality of Indian probate decisions affecting their property rights, it is equitable to require a claimant to act on his rights within a reasonable time after he knows or should know of them. See Estate of Josephine Bright Fowler, 8 IBIA at 204.

17 IBIA at 12.

Although appellant contends that she has diligently pursued her claim since Loving and Dick were decided, the documents she submits do not support her contention. They show that she wrote to BIA in January 1970 seeking general information about decedent's estate and that BIA responded on February 12, 1970, explaining the basis for the 1940 decision, i.e., that Cole's inheritance had been considered barred by the Oklahoma statute, and

further explaining that the Oklahoma law had changed since then. Even if appellant had not previously been aware of the Loving and Dick decisions, or of the basis for the 1940 decision in decedent's estate, the BIA letter contained enough information to put her on inquiry--that is, to make it apparent that she should inquire further into the matter. However, appellant presents no evidence that she or anyone else took any further action until 1990, when her son Calvin Guy requested a copy of the probate file. Whatever difficulties he may have encountered in these efforts in 1990, 5/ there is simply no evidence that appellant or her sons made any attempts to obtain documents from the record until 20 years after appellant learned of a possible basis for a petition to reopen decedent's estate.

Under the principles discussed in Dragswolf, the Board must deny reopening, even if appellant would otherwise be entitled to seek reopening based on Loving and Dick, because of the substantial and unexplained period of time in which she failed to pursue her claim.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Taylor's August 26, 1992, decision is affirmed.

_____

Anita Vogt
Administrative Judge

I concur:

_____

Kathryn A. Lynn
Chief Administrataive Judge

_____

5/ Appellant contends that her delay in seeking reopening was caused by the failure of BIA to provide access to the probate record. The record shows that Calvin Guy wrote to the Secretary of the Interior and the Assistant Secretary - Indian Affairs, on Mar. 16 and 17, 1990, respectively, seeking a copy of the probate file; that the request was initially referred to the Anadarko Area Office, which denied it on Privacy Act grounds on Apr. 20, 1990; and that a copy of the probate file was sent to Calvin Guy by BIA's Central Office on May 4, 1990. Even after they were furnished with a copy of the probate file, appellant and her sons waited almost 1-1/2 years before filing their petitions for reconsideration.